

The opinion in support of the decision being entered today is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* GABI BEN-AMI and URI ADONI

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Appeal 2007-2806  
Application 10/617,036  
Technology Center 3700

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Decided: October 16, 2007

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Before TERRY J. OWENS, HUBERT C. LORIN, and  
JOSEPH A. FISCHETTI, *Administrative Patent Judges*.

OWENS, *Administrative Patent Judge*.

DECISION ON APPEAL

The Appellants appeal from a rejection of claims 1, 2, 4, 6-9, 20-23 and 25. Claims 3, 5, 10 and 24 have been withdrawn from consideration by the Examiner. Claims 11-19 have been canceled.

THE INVENTION

The Appellants claim an unstable beverage receptacle. Claims 1 and 20 are illustrative:

1. An unstable receptacle for storing and dispensing a beverage, comprising:
  - (a) a container having an opening, said container holding a volume of a beverage selected from the group consisting of an alcoholic beverage and a carbonated beverage, said container being formed, such that, when said container is placed in any orientation upon a level surface, at least one third of the volume of said beverage spills out of said container, and
  - (b) a closure arrangement initially sealing said beverage within said container and openable for dispensing said beverage.

20. An unstable receptacle for storing a volume of a beverage, the receptacle comprising a metal can configured for sealingly containing the volume of the beverage, said metal can being formed with a ring pull device configured for non-sealably opening said metal can in such a manner as to form an opening, wherein said metal can is configured such that, after opening, when said metal can is placed in any orientation upon a level surface, at least one third of the volume of the liquid spills out of said metal can.

#### THE REFERENCES

Nohara	US 4,741,936	May 03, 1988
Esposito	US 5,071,042	Dec. 10, 1991
Diekhoff	US 5,718,352	Feb. 17, 1998

#### THE REJECTIONS

The claims stand rejected as follows: claims 1, 7-9 and 25 under 35 U.S.C. § 102(b) as anticipated by Nohara; claims 2, 4, 6 and 20-23 under

35 U.S.C. § 103 as obvious over Nohara in view of Esposito and Diekhoff; and claims 1, 2, 4, 6-9, 20-23 and 25 under 35 U.S.C. § 103 as obvious over Esposito in view of Nohara.

### OPINION

We affirm the aforementioned rejections

#### Rejection under 35 U.S.C. § 102(b)

Nohara discloses “a process in which a multi-layer pipe to be used for the production of a draw-blow-formed bottle comprising a polyester layer and an oxygen-barrier resin layer is prepared in the transparent state while preventing crystallization” (col. 1, ll. 13-17). Nohara discloses:

This pipe is cut into a certain size, and one end is heated and fused and is pressed by female and male molds having a cavity corresponding to an optional bottom shape, such as a semi-spherical shape, and a projection, whereby a closed bottom portion **26** as shown in FIG. **4** is formed.

The other end of this pipe **21** is heated and pressing, drawing and blow forming are carried out in optional molds, whereby a perform **30** having an opening **27** on the top end and also having lid-fitting, screw and anchoring portions such as a screw **28** and a neck ring (support ring) **29** on the periphery as shown in FIG. **5** is formed. [col. 7, ll. 51-63]

\* \* \*

The so-obtained multi-layer drawn polyester bottle **36** shown in FIG. **8** has an excellent transparency and has a gas barrier property much higher than that of a bottle composed solely of a polyester (drawn PET), which is excellent over other plastic bottles. Furthermore, this gas barrier property is freely adjustable, and the bottle has a good pressure resistance. Accordingly, this bottle is very suitable for filling and storing of carbonated drinks such as beer, cola and cider.... [col. 8, ll. 54-62]

Nohara's figure 8 shows that the "so-obtained multi-layer drawn polyester bottle" (col. 8, ll. 54-55) has a semi-spherical bottom.

The Appellants argue that Nohara is silent as to the reason for the semi-spherical bottom, and that filling Nohara's semi-spherical-bottomed bottle with carbonated beverage and sealing it with a lid would be highly unusual and contrary to the accepted practice over hundreds of years of forming bottles that stand stably (Br. 7). Nohara does not disclose the purpose of the semi-spherical bottom. However, Nohara discloses that the semi-spherical bottom is "an optional bottom shape" (col. 7, ll. 53-54), indicating that the bottom can have other shapes, perhaps the conventional flat bottom. Consequently, one of ordinary skill in the art would have interpreted Nohara as disclosing that the bottom of the final bottle, filled with carbonated beverage and sealed, can have a semi-spherical shape.

The Appellants argue, in reliance upon a declaration under 37 C.F.R. § 1.132 by Gideon Feiner (filed Feb. 1, 2006), that one of ordinary skill in the art would have interpreted Nohara as requiring that a stabilizing base be added to the semi-spherical-bottomed bottle to render the final bottle stable (Br. 7-8). Feiner argues that adding a stabilizing base was widely practiced, established art in the 1980s and 1990s, and that "[o]ne of ordinary skill in the art would definitely not find any inclination in Nohara that any round-bottomed bottle would be filled and sealed without addition of a stabilizing base" (Declaration 1-2). That inclination would come from Nohara's disclosures that 1) the semi-spherical bottom shape is optional (i.e., an option to other shapes such as, perhaps, the conventional flat shape)

(col. 7, ll. 53-54), and 2) the “so obtained multi-layer polyester bottle **36** shown in Fig. **8**” (col. 8, ll. 54-55) that has a semi-spherical bottom “is very suitable for filling and storage of carbonated drinks” (col. 8, ll. 61-62).

The Appellants argue that a closure and a stabilizing base are implicit in Nohara to the same extent (Br. 8). Nohara’s disclosures that that bottle has “lid-fitting, screw and anchoring portions such as a screw **28**” (col. 7, ll. 60-61) and that “this bottle is very suitable for filling and storage of carbonated drinks such as beer, cola and cider” (col. 8, ll. 61-62) would have been interpreted by one of ordinary skill in the art as a disclosure of a bottle containing a carbonated drink and having a closure thereon to keep the carbonation in the bottle. As discussed above, a stabilizing base is not implicit in Nohara.

For the above reasons we are not convinced of reversible error in the rejection under 35 U.S.C. § 102(b).

#### Rejections under 35 U.S.C. § 103

Esposito discloses an aluminum beverage can having attached to its top a bottle-like neck (col. 1, ll. 49-65; fig. 1).

Diekhoff discloses a hard temper aluminum alloy or steel bottle-shaped can, which can be a carbonated beverage can, having a threaded neck portion for receiving a closure to seal contents in the can (col. 1, ll. 6-9 and 61-63; fig. 28). Diekhoff refers to the bottle-shaped can as a bottle (col. 11, l. 67 – col. 12, l. 1).

The Appellants argue, regarding claims 2 and 4 (Br. 9):

[A]ccording to conventional thinking, a non-resealable seal would in fact be considered inferior to a resealable screw cap as implied by Nohara. Furthermore, the ring-pull of Esposito is chosen for its synergy with use of a metal can, and would not normally be chosen for a plastic bottle.

The Appellants' "would not normally be chosen" language indicates that ring-pull bottle closures, although not normally chosen, were known in the art. Moreover, the Examiner took official notice in the final rejection (mailed Sep. 1, 2005, p. 3) that bottle ring-pull closures were known in the art to provide easy bottle opening, and the Appellants have not challenged that official notice. Consequently, we accept it as being correct.

Accordingly, we conclude that it would have been prima facie obvious to one of ordinary skill in the art to use a ring-pull closure on Nohara's bottle to provide easy opening of the bottle as argued by the Examiner.

With respect to claim 6 the Examiner argues that it would have been prima facie obvious to one of ordinary skill in the art to make Nohara's can out of metal instead of plastic to make it stronger and more durable (Ans. 8). The Appellants argue that making Nohara's bottle from metal "would be contrary to the explicit teachings of Nohara which presents a solution for improving gas impermeability of plastic bottles as a preferred option over the metal containers discussed in the background section" (Br. 10). Nohara does not disclose that plastic bottles are a preferred option over metal containers. What Nohara discloses is that polyester bottles "are considerably inferior to metal cans or glass bottles as gas barrier vessels for

storing and maintaining carbonated drinks or fruit juice drinks” (col. 1, ll. 40-42). Nohara improves the gas barrier property of a polyester bottle by placing a gas barrier layer between two polyester layers (col. 7, ll. 39-44), but Nohara does not disclose that the polyester bottle has better gas permeability than a metal can. Hence, we are not persuaded of error in the Examiner’s argument that it would have been prima facie obvious to one of ordinary skill in the art to make Nohara’s bottle out of metal to make it stronger and more durable, particularly in view of Diekhoff’s disclosure of a metal bottle for packaging the same products packaged by Nohara, i.e., carbonated beverages beer and soft drinks (Diekhoff, col. 1, ll. 17-20; col. 11, l. 67 – col. 12, l. 1).

The Appellants’ arguments regarding the rejection of claims 20-23 over Nohara in view of Esposito and the rejection of claims 1, 2, 4, 6-9, 20-23 and 25 over Esposito in view of Nohara (Br. 10-11) are among the arguments discussed above and are not persuasive for the reasons given with respect to those arguments.

#### DECISION

The rejections of claims 1, 7-9 and 25 under 35 U.S.C. § 102(b) over Nohara, claims 2, 4, 6 and 20-23 under 35 U.S.C. § 103 over Nohara in view of Esposito and Diekhoff, and claims 1, 2, 4, 6-9, 20-23 and 25 under 35 U.S.C. § 103 over Esposito in view of Nohara are affirmed.

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No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

vsh

DR. MARK FRIEDMAN LTD.  
C/O BILL POLKINGHORN  
DISCOVERY DISPATCH  
9003 FLORIN WAY  
UPPER MARLBORO MD 20772